



STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL

Health & Human Services Division
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September 8, 2003

The Honorable Chiyo L. Fukino, M.D.
Director of Health
State of Hawaii
P.O. Box 3378
Honolulu, HI 96801-3378

Dear Dr. Fukino:

RE: Request for Attorney General's opinion on the State's authority to prevent nonpoint source water pollution and to require implementation of management measures to reduce nonpoint source pollution.

In a July 24, 2003 letter, you requested the Attorney General's legal opinion on the following two questions:

1. Does Hawaii have "enforceable policies" through which the Department of Health (DOH) can prevent nonpoint source pollution?¹
2. Does DOH have the authority to require nonpoint source polluters to implement specific "management measures"?²

¹ Before the federal Environmental Protection Agency (EPA) and the National Oceanic and Atmospheric Administration (NOAA) can approve Hawaii's proposed Coastal Nonpoint Pollution Control Program (CNPCP), the agencies must be satisfied that the state has an "enforceable policy" to prevent and stop nonpoint source pollution. The term "enforceable policy" is defined by the Coastal Zone Management Act (CZMA) as "[s]tate policies which are legally binding through constitutional provisions, laws, regulations, land use plans, ordinances, or judicial or administrative decisions, by which a State exerts control over private and public land and water uses and natural resources in the coastal zone." 16 U.S.C. § 1453(6a).

² Hawaii must also convince the EPA and NOAA that the state has the authority to require violators of Hawaii's nonpoint source pollution laws and regulations to implement "management measures." "Management measures" are defined as "economically achievable measures for the control of the addition of pollutants from existing and new categories and classes of nonpoint sources of pollution, which reflect the greatest degree of pollutant reduction achievable through the application of the best available nonpoint pollution control practices, technologies, processes, siting criteria, operating methods, or other alternatives." 16 U.S.C. § 1455b(g)(5). The particular management measures must be those required in the agencies' 'g' guidance, unless EPA and NOAA have approved alternative measures, or the State has been exempted from one or more of the 'g' guidance requirements. Our references to management measures include all federally prescribed or approved management measures.

Our review of the relevant statutes and regulations leads us to conclude that Hawaii has “enforceable policies” which authorize DOH to prevent nonpoint source pollution that is causing or will cause a violation of the state’s water quality standards (WQS). In particular, Hawaii Revised Statutes (HRS) § 342D-11 allows DOH to institute a civil action in a court of competent jurisdiction for injunctive relief to prevent WQS violations. Under that statute, DOH may request the court order nonpoint source polluters to implement all required “management measures.” Moreover, HRS § 342D-9(a)(1) permits DOH to issue a written notice and order requiring violators of the chapter to “take such measures as may be necessary to correct” their violation of HRS chapter 342D or its associated regulations.

HRS chapter 342D (“Water Pollution”) contains Hawaii’s equivalent of the federal Clean Water Act. HRS § 342D-50(a) states that “[n]o person, including any public body, shall discharge any water pollutant into state waters, or cause or allow any water pollutant to enter state waters except in compliance with this chapter, rules adopted pursuant to this chapter, or a permit or variance issued by the director [of DOH].” This prohibition applies to both point and nonpoint sources of pollution.³

It is possible for nonpoint sources of pollution to violate the administrative rules adopted pursuant to HRS chapter 342D.⁴ Hawaii Administrative Rules (HAR) chapter 11-54 (“Water Quality Standards”), adopted pursuant to HRS chapter 342D, sets out Hawaii’s water quality standards. The chapter classifies Hawaii’s water bodies and states what uses and pollutant levels are appropriate for each category. Although sections of the chapter deal exclusively with point source discharges, many of the chapter’s prohibitions and sections apply equally to both point and nonpoint sources of pollution.⁵

For example, HAR § 11-54-03(b)(1) defines what conduct is prohibited in class 1 inland waters:

³ In the context of federal water pollution statutes, the term “discharge” generally refers to point sources of pollution. By using the additional phrase “or cause or allow any water pollutant to enter state waters” in Hawaii Revised Statutes (HRS) § 342D-50(a), however, the Hawaii Legislature signaled that the section’s prohibition includes nonpoint sources as well.

⁴ In 1993, the Hawaii Legislature enacted HRS chapter 342E (“Nonpoint Source Pollution Management and Control”). Although chapter 342E specifically authorizes the director of the Department of Health (DOH) to adopt rules regulating nonpoint sources of pollution separately from point sources, DOH has, so far, declined to do so.

In enacting HRS chapter 342E into law, the Hawaii Legislature noted that “[chapter 342E] shall not be construed or interpreted to diminish the scope of chapter 342D, Hawaii Revised Statutes, or the authority of the director of health under chapter 342D.” Sec. 4, Act 345, Haw. Sess. Laws 1993. HRS chapter 342E should therefore not be interpreted as overruling or preempting regulations dealing with nonpoint source pollution adopted pursuant to HRS chapter 342D. Sec. 4, Act 345, Haw. Sess. Laws 1993.

⁵ It should be noted that the water quality standards (WQS) are an important limitation on the State’s power to prosecute nonpoint source polluters. HRS § 342D-50(a) prohibits “caus[ing] or allow[ing] any water pollutant to enter state waters except in compliance with [HRS chapter 342D], rules adopted pursuant to [HRS chapter 342D], or a permit or variance issued by the director [of DOH].” Although point sources can acquire permits to discharge limited amounts of pollution, no statute, rule (other than the WQS), or permit in any way authorizes nonpoint source pollution. A nonpoint polluter who could successfully convince a court that the WQS do not apply to nonpoint sources of pollution would be throwing away its only defense against strict liability for *any* nonpoint pollution, no matter how insignificant.

It is the objective of class 1 waters that these waters remain in their natural state as nearly as possible with an absolute minimum of pollution from **any human-caused source** . . . Waste discharge into these areas is prohibited. Any conduct which results in a demonstrable increase in levels of **point or nonpoint** source contamination in class 1 waters is prohibited. (Emphases added).

HAR § 11-54-03(c)(1) similarly forbids nearly all pollution in class AA marine waters:

It is the objective of class AA waters that these waters remain in their natural pristine state as nearly as possible with an absolute minimum of pollution from **any human-caused source or actions**. To the extent practicable, the wilderness character of these waters shall be protected. (Emphasis added).

Neither HAR § 11-54-01.1, which states that bodies of water whose quality is better than the relevant WQS shall not be “lowered in quality” without a determination by DOH’s director that the “change” is justifiable, nor HAR § 11-54-04(a), which provides that the state’s waters shall be free of certain harmful substances attributable to “domestic, industrial, or other controllable sources of pollutants[.]” make any distinction between point and nonpoint sources of pollutants.

DOH need not wait for a nonpoint source violation to occur before taking action. HRS § 342D-11 authorizes the DOH director to “institute a civil action in any court of competent jurisdiction for injunctive or other relief to prevent any violation of this chapter [or] any rule adopted pursuant to this chapter[.]” The section gives the court broad discretion to grant “other relief”, including the implementation of “management measures” outlined in the federal Coastal Zone Management Act (CZMA) and described in EPA and NOAA’s ‘g’ guidance (discussed in footnote 2 above).

HRS chapter 342D also gives DOH the authority to issue a written notice and order to anyone who has violated or is violating the chapter or its associated regulations. HRS § 342D-9(a) & (b). The order may “specif[y] a reasonable time during which [the polluter] shall be required to take any measures that may be necessary to correct the violation and to give periodic progress reports[.]” Again, the “measures” referred to could certainly include the “management measures” discussed in footnote 2 above.

Finally, HRS § 342D-10(a) gives the DOH director emergency powers to deal with particularly hazardous or dangerous spills. It states that if the DOH director “determines that an imminent peril to the public health or safety is or will be caused by the discharge of waste or any combination of discharges of waste which requires immediate action, the director, with the approval of the governor and without public hearing, may order any person causing or contributing to the discharge of waste to immediately reduce or stop such discharge or the director may take any and all other actions as may be necessary.” The phrase “any combination of discharges of waste” implies that the Legislature intended this section to apply to any imminently dangerous source of pollution, whether single or multiple, point, or nonpoint.

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In conclusion, the State currently has the authority to proactively enforce its WQS to prevent or abate nonpoint sources of pollution. Through court injunction (HRS § 342D-11) or agency notice and order (HRS § 342D-9), DOH may also require that nonpoint source polluters implement all federally required "management measures" designed to bring the source in question into compliance with the WQS and other applicable laws and regulations.

Sincerely,

A handwritten signature in cursive script, appearing to read "Benjamin Roberts".

Benjamin Roberts
Deputy Attorney General

APPROVED:

A handwritten signature in cursive script, appearing to read "Mark J. Bennett".

Mark J. Bennett
Attorney General